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IN THE

Supreme Court of the United States

October Term, 1976

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,
Petitioners,

vs.

CARLA ANDERSON HILLS, Secretary, Department Housing & Urban Development, et al,
Respondents.

No. 76 670

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY IN OPPOSITION

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OPINIONS BELOW

JURISDICTION

The unreported opinion and judgment of the Court of Appeals, affirming the District Court, were entered April 8, 1976 (Appendix, 48). The instant petition was filed with this Court on November 12, 1976, considerably more than 90 days thereafter. No extension of time for applying for a writ of certiorari was granted or even requested by Petitioners.

A Petition for Rehearing before the Sixth Circuit was filed April 28, 1976 and denied as being "without merit" on May 25, 1976. On or about August 19, 1976 Petitioners filed in this Court a Motion for leave to proceed *in forma*

pauperis and to dispense with printing the petition which was denied on October 4, 1976.

Under any proper computation of the 90-day period, the petition filed on November 12, 1976 was not timely. Pursuant to 28 U.S.C. §2101(c), this Court lacks jurisdiction of this matter.

STATUTE INVOLVED

The statute governing the time for filing a petition for certiorari directed to a court of appeals in a civil action is 28 U.S.C. §2101(c):

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days before the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

ADDITIONAL QUESTIONS INVOLVED

1. Whether this Court has jurisdiction to entertain the instant petition filed more than ninety days after entry of the opinion and judgment of the Court of Appeals?

2. Whether the questions presented by Petitioner in this Court merit consideration under any of the standards for granting a writ of certiorari?

STATEMENT OF THE CASE

The stated nature of this case, according to the Complaint and First Amended Complaint was broad ranging and massive violations of federal housing statutes, federal and

state antitrust laws, the federal and state securities acts, the United States and Michigan Constitutions, the Internal Revenue Code, the Civil Rights Acts of 1867, 1964 and 1968, breach of contract, breach of fiduciary duty, misrepresentation, fraud and deceit. This catalog of theories was asserted to support various injunctions, mandamus, accounting, imposition of a constructive trust, receivership, declaratory judgment, invalidation of outstanding bonds, and damages totaling approximately $13,000,000.00. The principal defendant was the Michigan State Housing Development Authority ("The Authority"), an instrumentality of the State of Michigan. The Authority sought prompt resolution of these matters, because the Complaint and First Amended Complaint sought to declare all prior bond issues of the Authority illegal and void, sought to enjoin the Authority from use of any proceeds of any bonds which it had on hand, for any purpose, even to pay off prior bonds, sought to declare all statutes of the State of Michigan as applied to Plaintiff unconstitutional, sought to enjoin the Authority from issuing any more bonds or notes, sought to have a receiver appointed for the Authority, sought to have the Authority enjoined from participating in any federal programs, and sought to enjoin the Authority from any further processing, evaluation, or making of loans for low or moderate income housing projects or developments in the State of Michigan.

Notwithstanding this broad spectrum of allegations, the Authority submits that the true nature of this case may be ascertained by reviewing the history of litigation between the parties commencing in January, 1975. The same sweeping charges were first contained in a counterclaim filed in response to a complaint filed in Wayne County Circuit Court for foreclosure of a mortgage previously issued by

the Authority to Petitioner Second Avenue Limited Dividend Housing Association ("Second Avenue"). That Counterclaim, somewhat enlarged and lengthened, became the Complaint first filed in the present case, which in turn became the First Amended Complaint filed by Petitioners on the very day of the hearing of the Authority's motions to dismiss the Complaint.

The Authority's work includes the important public function of raising money by the sale of bonds and notes, which money it uses to make loans to finance the construction and rehabilitation of housing for persons of low or moderate income. In pursuance thereof, in 1972 the Authority and Citizens Mortgage Corporation agreed to and did lend Petitioner Second Avenue $1,798,000.00, taking a mortgage in return. The Authority filed its Compaint to foreclose this mortgage on January 28, 1975, in Wayne County Circuit Court, Civil Action No. 75 054 287. Second Avenue removed the foreclosure action to the United States District Court, where it became No. 75-70332, and filed and served a counterclaim. That Counterclaim was shorter than, but contained a substantial number of the allegations contained in, the Complaint and First Amended Complaint which are the subject of this present appeal. The Authority, because of the lack of jurisdiction, promptly sought to remand the matter to the State Court, filing its Motion to this effect on April 30, 1975. On May 5, 1975, Second Avenue filed its Motion to Disqualify the Authority's counsel, and, when this motion, together with a request that the entire proceedings be stayed, was denied from the bench on May 5, 1975, Second Avenue filed a Petition for Writ of Mandamus in the Sixth Circuit on May 8, 1975, No. 75-1492. On May 12, 1975, the adjourned date for hearing the Authority's Motion to Remand, Second Avenue filed an

Amended Petition for Removal, and on the same day, the District Court entered its Order granting the Authority's Motion to Remand. Second Avenue appealed to the Sixth Circuit from the granting of this Order, No. 75-1773. The Petition for Writ of Mandamus in No. 75-1492 was denied on July 10, 1975. The appeal from the Order of Remand in No. 75-1773 resulted in affirmance of the District Court's decision, in an Opinion filed by the Sixth Circuit October 1, 1975.

The Complaint in the instant cause was filed on May 1, 1975. On May 15, 1975, the Authority filed its Motion to Dismiss the Complaint, together with other motions directed to the Complaint and to particular portions thereof. The matter was set for hearing on May 27, 1975. On May 22, 1975, counsel for Second Avenue sought to adjourn the hearing date on grounds that Second Avenue needed certain factual discovery. On the same day, the Court entered its Order limiting the scope of the hearing scheduled for May 27, 1975, to matters involving only legal issues. On May 27, 1975, Plaintiffs filed and served their First Amended complaint and the hearing was held on the Authority's motions directed to both the Complaint and the First Amended Complaint. The District Court considered extended oral argument and entered its Opinion granting the Authority's motions to dismiss (App. 3), and on the same day entered its Judgment of Dismissal (App. 1). Plaintiffs' subsequent motions directed toward altering, amending, and vacating the Judgment were denied by Orders of the Court dated June 12, 1975, and filed June 13, 1975. (App. 39, 41, 44). Plaintiffs filed a Notice of Appeal to the Sixth Circuit on June 26, 1975.

After extensions of time were sought and obtained for filing Plaintiffs' Brief, the Sixth Circuit heard oral argu-

ment on April 5, 1976 and issued its *per curiam* opinion and judgment on April 8, 1976 (App. 47). A motion for rehearing was filed on April 28, 1976 and was denied summarily on May 25, 1976 (App. 49).

On August 19, 1976 Petitioners filed with the Clerk of this Court a "Motion for Leave to Proceed in Forma Pauperis and Motion for Order Dispensing Printing Requirements for Brief, Appendix and All Pleadings and Papers in the Proceeding in Unprinted Form" and, at the same time, attempted to file a petition for certiorari which was not in the form required by the rules of this Court. That Motion was denied by Order of this Court dated October 4, 1976. The present Petition for a Writ of Certiorari was filed November 12, 1976 and received by counsel on November 15, 1976.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE PETITION FOR CERTIORARI WAS NOT TIMELY FILED.

Petitioners seek review of the opinion and judgment entered by the United State Court of Appeals for the Sixth Circuit on April 8, 1976. The petition for certiorari was docketed in this Court on November 12, 1976. Ninety days after April 8, 1976 was July 7, 1976.

The Petition makes no attempt at claiming timeliness; it merely states the dates of the actions of the Sixth Circuit. Presumably Petitioners will claim that the ninety day period began anew from the Sixth Circuit's denial of the petition for rehearing on May 25, 1976, that the purported petition filed August 19, 1976 was within that period, and that

the pendency before this Court of the motion for leave to proceed *in forma pauperis* tolled the further running of the ninety day period. This claim is not only inconsistent with the decisions of this Court regarding computation of the ninety day period,[1] but, even if accepted, does not make the November 12, 1976 petition timely. Ninety days after May 25, 1976 would have been August 24, 1976. The filing of the motion and attempted filing of the improper petition on August 19, 1976 left five days unexpired in this period. The motion was denied on October 4, 1976 but the present Petition was not filed until November 12, 1976. Under any conceivable computation of the ninety day period, the Petition was not timely.

It has long been established that the time requirements for a petition for a writ of certiorari to a court of appeals in a civil action are jurisdictional and that failure to comply with such time requirements precludes consideration of the petition by this Court.[2] *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U.S. 169, 177-78 (1932); *Gotham Can Co.* v. *United States*, 281 U.S. 706 (1930); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923). Consequently, Re-

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[1] *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206,211 (1952).

[2] A different rule may apply in other circumstances: (a) in criminal petitions for certiorari where the time requirements are established not by statute but by Supreme Court rule which occasionally has been waived, see, *e.g.*, *Durham* v. *United States*, 401 U.S. 481 (1971) (b) in direct appeals or petitions for certiorari to trial courts after post-trial motions, see, *e.g.*, *United States* v. *Adams*, 383 U.S. 39 (1966) and Rule 4, F.R.A.P.; and (c) in appeals or petitions for certiorari to the highest court of a state where the local rules provide that a motion for rehearing operates as an automatic stay, see, *e.g.*, *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). Rules 35(c) and 40, F.R.A.P., and Sixth Circuit Rule 3(b) make clear that the petition for rehearing did not suspend the finality of the April 8, 1976 opinion and judgment.

spondent Michigan State Housing Development Autority respectfully submits that the petition for certiorari filed by Petitioner on November 12, 1976 was not timely, may not be considered, and should be denied.

II.

PETITIONERS HAVE SHOWN NO BASIS FOR GRANTING A WRIT OF CERTIORARI

The Petition raises nothing new. It rehashes the same tired, vague, conclusory allegation and arguments rejected on numerous occasions by the two courts below. It cites precisely the same case authority for the same general conclusions about standing, right of action, and antitrust immunity. There are no clear, precise issues of importance presented for this Court's resolution. Rather, there is the same broad claim that the actions of the lower courts are in conflict with nearly every important decision of this Court in its last two terms. The present petition is merely the last gasp in a two year struggle to impede foreclosure of a mortgage by the Authority and do not merit consideration by this Court.

Petitioners attempt to construct some inconsistency between the decisions in the present case and that of this Court in *Hills* v. *Gautreaux*, __ U.S. __, 96 S. Ct. 1538 (April 20, 1976) and the Third Circuit in *Shannon* v. *HUD*, 436 F.2d 809 (3rd Cir. 1970). Even a cursory reading of those cases discloses that the only similarity between them and the present case is that they involve housing. Neither the factual nor the legal issues involved are remotely similar.

Petitioners tacitly admit (Pet. 24-5) that *Warth* v. *Seldin*, 422 U.S. 490 (1975), decided after the decision of the District Court, is conclusive as to their lack of standing and merely argue that *Warth* was wrongly decided.

Finally, Petitioners cite one new case, *Cantor* v. *The Detroit Edison Company*, __ U.S. __, 49 L.Ed.2d 1141 (July 6, (1976), in an attempt to breathe life into an antitrust claim against governmental agencies and officials. *Cantor* neither requires nor permits such a conclusion.

The remaining arguments in the Petition are merely directed to the claim that the lower courts incorrectly applied well accepted legal standards. As such, those arguments present no basis for granting the Petition under Rule 19.

No novel or significant legal issues are presented by the Petition. No conflict among the Circuits or between the Sixth Circuit and the decisions of this Court are presented. The only real claim presented is that this Court assist petitioners' efforts to delay foreclosure of a mortgage which has been in default since 1972. The Michigan State Housing Development Authority respectfully submits that this Court, like the two courts below, should reject those efforts which are neither timely nor meritorious.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,
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